SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1904.

E. B. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHINGTON, ET AL.,
Plaintiffs in Error,

vs.

LUCRETIA L. GREEN, WILLIAM B. GREEN, EDITH GREEN, ET AL.,
Defendants in Error.

No. 259

STATEMENT, BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

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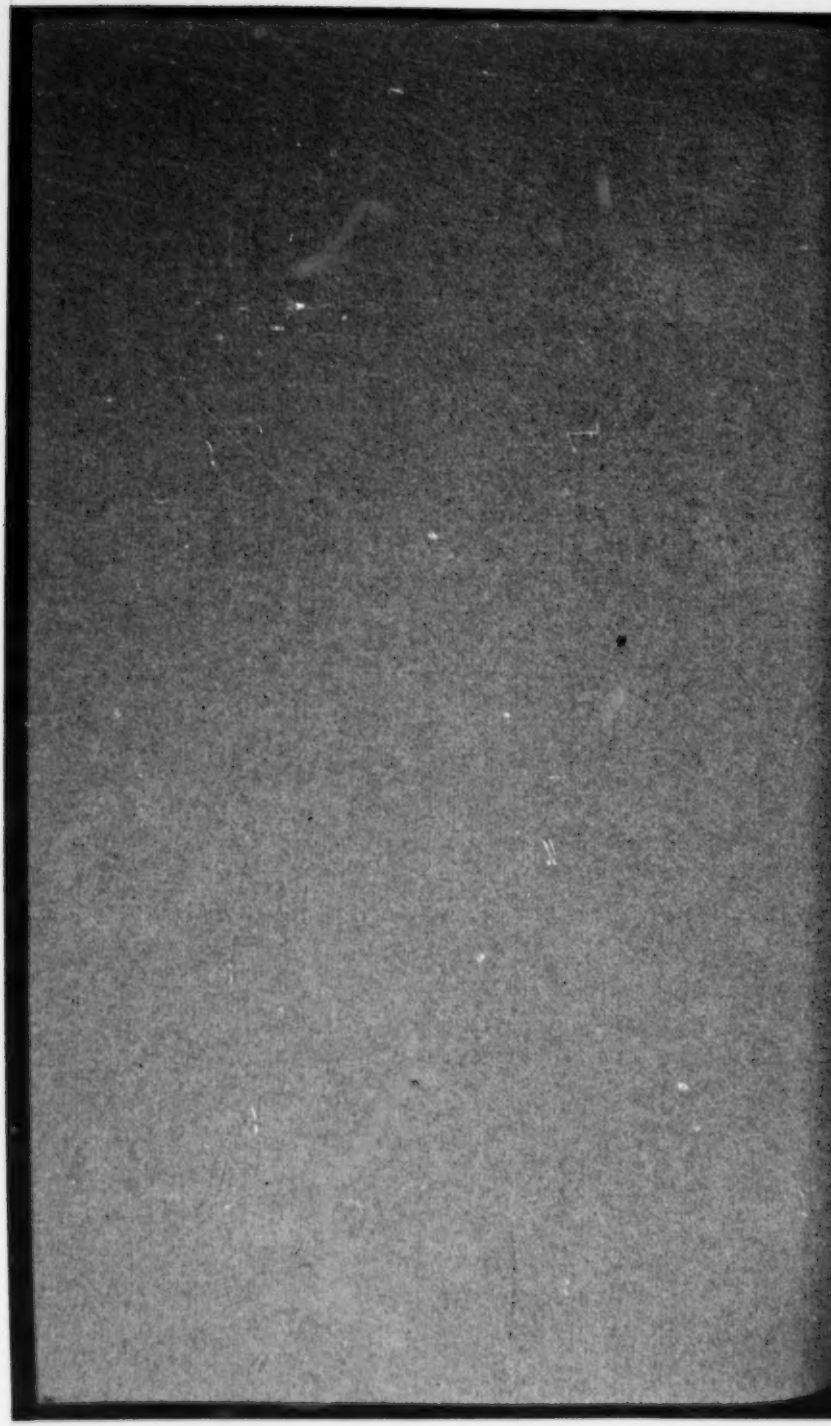

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1904.

R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHINGTON, ET AL.,
Plaintiffs in Error,

vs.

LUCRETIA L. GREEN, WILLIAM E. GREEN, EFFIE GREEN ET AL,
Defendants in Error.

No. 260

STATEMENT OF CASE.

This was an action of ejectment brought by Sanford M. Green, Lucretia L. Green, William E. Green, and Effie Green, as plaintiffs, against R. R. Dunbar, Elizabeth Dunbar, George Washington, Allen F. Reed, Al. Payne, T. J. Payne, John Small and George Dunbar, as defendants, to recover the possession of Lots 18, 42, 43, 44, 45 and 47 in Block 10; Lots 8, 10, 11, 12, 13, 27, 28, 29 and 30, in Block 8; Lots 18, 19, 20, 23, 24, 25, 26, 35 and 36 in Block 11; Lot 9, in Block 12; Lots 33 and 34, in Block 13; Lots 19 and 20 in Block 16, Lots 20 and 21,

in Block 19, and Lot 1, in Block 7, all in Argentine Heights an addition to the City of Argentine, Wyandotte County, Kansas, and $500 as damages (Transcript of Record p. 1). On November 20, 1900, the defendants in said suit filed therein their separate answer and cross-petition, in which they alleged that they were the owners and in possession of the property in controversy, and asked that their title be quieted (Rec. p. 27). Said plaintiffs filed a reply to this answer (Rec. p. 28), and on the issues thus joined trial of said cause was had on Nov. 19, 1900, upon an agreed statement of facts (Rec. p. 2). From said agreed statement of facts it appeared that the property in controversy was on December 28, 1859, patented by the United States to Susan Whitefeather, as the head of a family consisting of herself and George Washington, her son, who were members of the Shawnee tribe of Indians, the patent reciting that it was issued under the provisions of the second and ninth articles of the treaty of May 10, 1854, between the United States and the Shawnee tribe of Indians, and section 11 of the act of Congress of March 3, 1859, and it conveyed to said Susan Whitefeather, and to her heirs forever, the northwest quarter of Section 29, and the southeast quarter of the northwest quarter of section 30, all in township 11, south of range 25, east of the sixth principal meridian in Kansas and other lands in Wyandotte county, Kansas, "with the stipulation prescribed by the Secretary of the Interior under the act of Congress aforesaid of March 3, 1859, that the said tracts should never be sold or conveyed by the grantor or her heirs, without

the consent of the Secretary of the Interior for the time being" (Rec. pp. 3 and 4); that the Shawnee Indians existed as a tribe, and were so recognized by the political department of the government of the United States on December 30, 1870, and at all times prior to said date, and are still so recognized (Rec. p. 5); that on said December 28 1859, certain lands (not in controversy in this action) and situated in Johnson County, Kansas, were on December 28, 1859, patented by the United States of America, to George Washington, as the head of a family consisting of himself, Judy Washington, David Washington and Rebecca Washington, who were members of the Shawnee tribe of Indians, and recited that it was issued under the provisions of the second and ninth articles of the treaty of May 10, 1854, between the United States and the Shawnee tribe of Indians, and section 11 of the act of Congress of March 11, 1859, and it conveyed said lands to said George Washington, as the head of a family, consisting of himself, Judy Washington, David Washington and Rebecca Washington, and to his heirs forever, "with the stipulation prescribed by the Secretary of the Interior under the act of Congress aforesaid, of March 3, 1859, that the said tracts should never be sold or conveyed by the grantor or his heirs, without the consent of the Secretary of the Interior for the time being (Rec. pp. 5 and 6); that on November 27th, 1867, Jonathan Gore of Johnson County, Kansas, was by the probate court of said Johnson County, Kansas, and on the application of George Washington, a minor over the age of fourteen

years, and who represented that his parents George Washington and Judy Washington were both dead, appointed as the guardian of the person and property of said George Washington, and took the oath of office, as such guardian, (Rec. pp. 6 and 7); that the only lands in which George Washington, minor heir of Susan Whitefeather, deceased, was interested, were located in Wyandotte County, State of Kansas, (Rec. p. 8); that on March 2, 1869, said Jonathan Gore, describing himself as guardian of George Washington, minor heir of Susan Whitefeather, deceased, petitioned the probate court of Johnson County, Kansas, for the sale of the northwest quarter of section 29, and the southeast quarter of the northwest quarter of Section 30, all in township 11, south of range 25, east of the 6th principal meridian, in Wyandotte County, Kansas, for the reason that said ward was not possessed of any personal property that could be appropriated to his proper use and benefit and that said land was unproductive timber land from which he received no income and same was subject to waste by reason of trespass, and that it was necessary that said land should be sold for the benefit of said ward, which petition was by said court found to be true, and said guardian was ordered to sell the interest of said minor in said real estate at private sale and make return of his proceedings to said court (Rec. pp. 9 and 10); that said Jonathan Gore, guardian, filed in said probate court a sale bond in the sum of $4,000 to account for the proceeds of the sale of said land, with S. M. Cornatzer and

Jas. A. Walker as sureties, and an appraisment of said property at $2,000, made by David Bluejacket and Jonathan Sparlin, two residents of Wyandotte County, Kansas, (Rec. p. 11); that on March 18, 1869, said Jonathan Gore, guardian, made and filed in said probate court of Johnson County, Kansas, his report of the sale of said land, at private sale, on March 3, 1869, to Joel F. Kinney for $2,000, which sale was by said probate court on said March 18, 1869, approved and confirmed (Rec. pp. 12 and 13); that on October 14, 1868, said Jonathan Gore, describing himself as guardian of George Washington, a Shawnee Indian and minor heir and sole heir of Susan Whitefeather, deceased, conveyed said land to Joel F. Kinney, for the expressed consideration of $2,000, and said deed was on May 21, 1869, approved by J. D. Cox, Secretary of the Interior, but said deed did not recite that it was made in pursuance of any authority from any court (Rec. pp. 13 and 14); that from the certificates accompanying said deed it appeared that it was a deed of conveyance made and executed by George Washington, a Shawnee Indian, by his guardian, Jonathan Gore, and Graham Rogers and Charles Tucker, the two chiefs of the Shawnee Nation, certified that George Washington was the sole heir of Susan Whitefeather, deceased, a Shawnee Indian (Rec. p. 14); that on July 10, 1862, on the petition of Jacob Whitefeather and Elizabeth Longtail, wherein it was stated that George Washington was a minor under the age of fourteen years, and resident of said Wyandotte County, and that his father and mother were both dead, and that he

was the only surviving child and said petitioners were the brother and sister of the deceased mother of said infant, and at the time of the decease of the mother of said infant said Elizabeth Longtail took the said infant into her care and custody and had kept him from that time, a period of about six years, and said infant had about 400 acres of land situated in said county of which about 10 acres was under improvement with a small cabin on it, and had personal property to the amount of $400, and the annual rents and income of said 10 acres under improvement was $25, and his property was so situated that it required the care and judgment of a person of mature years and said Elizabeth Longtail was a suitable person to be the guardian of said infant, and requesting her appointment as such guardian, said appointment was on said day made by said probate court of Wyandotte County, Kansas, and said Elizabeth Longtail duly gave bond and took the oath of office as such guardian (Rec. pp. 17 to 19); that said deed from Jonathan Gore, guardian, to Joel F. Kinney, was the only deed to said land, in which the lots in controversy are located, that has been approved by the Secretary of the Interior (Rec. p. 19), and whatever title to the land in controversy that was acquired by said Joel F. Kinney by said deed from Jonathan Gore, guardian, was by mesne conveyances vested in the plaintiffs in said suit (Rec. p. 26); that the reported decision of the case of Hannon vs. Taylor, 57 Kan. 1 (45 Pac. Rep. 51), contains the laws of the Shawnee tribe of Indians, and that the following laws of said tribe have been in effect ever

since the year 1854, viz: Article 5, of said Shawnee laws in which it is provided by the national council of said tribe that in addition to their duties as councillors, the Shawnee Chiefs and Council shall be required and authorized to appoint guardians for insane and incompetent persons and also for all minor orphan children on application being made by some competent and responsible person or persons for that purpose (Rec. pp. 19 and 20); that George Washington, one of said defendants, and son of Susan Whitefeather, deceased, and a Shawnee Indian, was made a citizen of the United States at Vinita, Indian Territory, before Judge Gill, United States Circuit Judge of the northern district, Indian Territory, on September 26, 1900, and that said defendant R. R. Dunbar had been in the possession of the property in controversy herein for the last five years as the agent and tenant of George Washington, and that said land was vacant and unoccupied up to the time said R. R. Dunbar so took possession of the same (Rec. p. 26).

Said cause was taken under advisement by the trial court and on December 14, 1901, said court found for the plaintiffs and against the defendants, and that at the time of the commencement of said action the said plaintiffs were the owners and entitled to the immediate possession of said real property, and that said defendants wrongfully withheld the possession of said property from them, and the judgment of the court was that said plaintiffs recover of said defendants the possession

of said property, with costs of suit, and that execution issue therefor, defendants excepting (Rec. p. 29).

Thereafter said defendants, as plaintiffs in error, prosecuted their proceeding in error to reverse said judgment, to the Supreme Court of the state of Kansas, and Sanford M. Green, one of the defendants in error having died, by due proceedings therefor, and by consent, the said action was revived in said Supreme Court of Kansas, in the names of Lucretia L. Green, Effie Green, William E. Green, Lina Hill, Fannie E. McHale and Lottie DeWit, and ordered to proceed against them (Rec. p. 30).

And thereafter and on April 11, 1903, said judgment of the District Court of Wyandotte County, Kansas, was by the said Supreme Court of Kansas, affirmed, with costs (Rec. p. 30), and in its decision in said case it was held that George Washington, although a member of the Shawnee tribe of Indians, was guilty of laches in not sooner asserting his claim of title to the land in controversy, and that where the land of a Shawnee Indian is sold while he is a minor, by a guardian appointed by a probate court, and the Indian after coming of age delays for more than 21 years to question the validity of the deed, and the property has in the meantime greatly increased in value and passed into the hands of different owners, no fraud or concealment or other exceptional circumstances tending to excuse the delay being shown, he cannot afterwards be permitted to attack the deed on the ground that the proceedings upon which it

was based were void for want of jurisdiction (Rec. pp. 31 to 37).

On May 1, 1903, the said plaintiffs in error filed their petition for a rehearing in said Supreme Court of Kansas, and same was by said court overruled and denied on May 9, 1903.

Thereafter this writ of error was sued out and allowed to revise the said judgment of the Supreme Court of the State of Kansas.

SPECIFICATION OF ERRORS.

1. The Supreme Court of the State of Kansas erred in affirming the decision of the District Court of Wyandotte County, Kansas, and in deciding in an action of ejectment in which the plaintiffs in error were defendants and the defendants in error were plaintiffs, that the plaintiff in error, George Washington, was not the owner of, nor entitled to the possession of the property in controversy herein, being lots 18, 42, 43, 44, 45 and 47, in Block 10; lots 10, 11, 12, 13, 27, 28, 29, 30 in Block 8; lots 18, 19, 20, 23, 24, 25, 26, 35, 36 in Block 11; lot 9 in Block 12; lots 33, 34 in Block 13; lots 19, 20 in Block 16; lots 20, 21 in Block 19; lot 1 in Block 7, in Argentine Heights, an addition to the City of Argentine, in Wyandotte County, Kansas, and being part of the northwest quarter of Section 29, Township 11, Range 25, in said Wyandotte County, Kansas, and which was granted on December 28, 1859, by patent from the United States of Amercia to Susan Whitefeather, as the head of a family consisting of herself and said George Washington, her son, members of the Shawnee tribe of Indians, under the provisions of the second and ninth articles of the Treaty of May 10, 1854, between the Government of the United States and the Shawnee tribe of Indians and section 11 of the Act of Congress of March 3, 1859, and with the stipulation prescribed by the Secretary of the Interior under said Act of Congress of March 3, 1859,

that the said land should never be sold or conveyed by the said grantor, or her heirs, without the consent of the Secretary of the Interior for the time being, and which said George Washington inherited as the sole heir of said Susan Whitefeather who died before July 10, 1862, but that the same was vested in the defendants in said suit, defendants in error herein, being derived by them through mesne conveyances from Joel F. Kinney, grantee of a guardian's deed of date October 14, 1868, from Jonathan Gore, guardian of George Washington, a minor, to said Joel F. Kinney, appointed as such by the Probate Court of Johnson County, Kansas, and approved by the Secretary of the Interior on May 21, 1869, and which guardian's deed was admitted to be a void deed, the said Supreme Court of Kansas deciding that the title of said George Washington was barred by laches and estoppel, and by the statute of limitations of the State of Kansas, although said George Washington was at all times and at the time of the trial a member of the Shawnee tribe of Indians, and was on September 26, 1900, duly made a citizen of the United States in and by the Circuit Court of the United States for the Northern District, Indian Territory, at Vinita, and said Shawnee tribe existed as a tribe, and was so recognized by the political department of the Government of the United States from the time of the issuing of said patent to Susan Whitefeather to the time of the trial of the case, and although the property in controversy had remained va-

cant and unimproved until possession was taken of the same for George Washington on June 25, 1895.

2. The Supreme Court of the State of Kansas erred in deciding that the right and title of George Washington, a Shawnee Indian living with his tribe, and recognized as such by the proper officers of the Government, to the land in controversy, which he inherited from his mother, Susan Whitefeather, to whom it was granted by patent from the United States of America, under the provisions of the second and ninth articles of the treaty of May 10, 1854, between the Government of the United States and the Shawnee Tribe of Indians, could be lost by his laches, and that the statutes of limitations of the State of Kansas would run against him and against his right and title to said land and he could be estopped by receiving some money from the proceeds of a sale of said property by a guardian appointed for George Washington by the Probate Court of Johnson County, Kansas.

3. The Supreme Court of the State of Kansas erred in deciding that the right and title of George Washington to the property in controversy could be sold and conveyed by Jonathan Gore, who was appointed guardian by the Probate Court of Johnson County, State of Kansas, and that said land, and George Washington. the owner, was not exempt from the jurisdiction and control of the laws of the State of Kansas, by the treaties between the Government of the United States and the Shawnee tribe of Indians of date August 8, 1831, Articles 2, 9 and 10, and of May 10, 1854, Articles

1, 9 and 14, and the Act of Congress of January 29, 1861, admitting the State of Kansas into the Union.

4. The Supreme Court of the State of Kansas erred in deciding that George Washington, a tribal Shawnee Indian, and recognized as such by the proper officers of the government of the United States could be guilty of laches, and be estopped by his conduct, and barred of his interests in land under the treaty of May 10, 1854. between the Government of the United States and the Shawnee tribe of Indians.

5. The Supreme Court of the State of Kansas erred in,deciding that George Washington, a tribal Shawnee Indian, was guilty of laches because for 21 years he neglected to bring his present action for the possession of the land in controversy, when said land was at all times during said 21 years vacant and unoccupied land and the only possession ever taken of the same was for said George Washington.

BRIEF OF THE ARGUMENT.

We think that it would be better to present all of the above specifications of error together.

The fee title to the property in controversy herein is admittedly in the plaintiff in error, George Washington.

The land was granted by patent from the United States to "Susan Whitefeather, the head of a family consisting of herself and George Washington," Shawnee Indians (Rec. p. 4), and the George Washington named in said patent is still alive, was made a citizen of the United States on September 26, 1900 (Rec. p. 26), and was in the possession of the property in controversy herein for the five years prior to the commencement of this action by his agent and tenant, the plaintiff in error, R. R. Dunbar (Rec. p. 26).

The title of defendants in error is grounded solely on the deed from Jonathan Gore, guardian of George Washington, a minor, to Joel F. Kinney (Rec. pp. 13, 26). If that deed is void the title of the defendants in error must fail.

In considering the validity of such guardian's deed the following facts that have been agreed to must be considered:

That George Washington, the plaintiff in error, never owned any land in Johnson County, Kansas, and

the only land that he was interested in was situated in Wyandotte County, Kansas (Rec. p. 8).

That on July 9, 1862, Elizabeth Longtail was appointed the guardian of said George Washington by the Probate Court of Wyandotte County, Kansas, and on said date the mother and father of George Washington were both dead and he was the only surviving child, and had 400 acres of land in Wyandotte County, Kansas, and had personal property to the amount of $400.00 (Rec. pp. 17 and 18).

That on October 14, 1868, Jonathan Gore, pretending to act as the guardian of George Washington, "minor heir and sole heir of Susan Whitefeather, deceased," sold the property in controversy to Joel F. Kinney, for the sum of $2,000 (Rec. p. 13).

That two George Washingtons, Shawnee Indians, were interested in patents to lands from the United States. George Washington, the plaintiff in error herein, in a patent to the land in controversy from the United States to "Susan Whitefeather, the head of a family consisting of herself and George Washington," and situated in Wyandotte County, Kansas (Rec. p. 3), and another George Washington, who was interested in a patent from the United States to "George Washington, the head of a family consisting of himself, Judy Washington, David Washington and Rebecca Washington," to lands in Johnson County, Kansas (Rec. p. 5).

That the George Washington, who was one of the grantees in the patent to the lands in Johnson County,

Kansas, and who was the head of a family consisting of himself, Judy Washington, David Washington and Rebecca Washington, died, and on November 27, 1867, and on the petition therefor of George Washington, "a minor over the age of fourteen years, whose parents are both dead," Jonathan Gore was by the Probate Court of Johnson County, Kansas, appointed as the guardian of "George Washington, a minor heir of George and Judy Washington, deceased, and over the age of fourteen years" (Rec. pp. 6 and 7).

That on October 14, 1868, Jonathan Gore, pretending to act as the guardian of "George Washington, a Shawnee Indian, minor heir and sole heir of Susan Whitefeather, deceased," made a guardian's deed for the lands in Wyandotte County, Kansas, that were patented to Susan Whitefeather, the head of a family consisting of herself and George Washington, to Joel F. Kinney, for an expressed consideration of $2,000 (Rec. p. 13), which deed was on May 21, 1869, approved by J. D. Cox, Secretary of the Interior (Rec. p. 16).

That on March 2, 1869, and about five months after his appointment as guardian of George Washington, the minor heir of George and Judy Washington, both deceased, Jonathan Gore, representing himself to be the guardian of "George Washington, a minor heir of Susan Whitefeather, deceased," petitioned the Probate Court of Johnson County, Kansas, for permission to sell "land that to him is unproductive and from which he derives no income" (without describing any land whatever), and

thereon the Court made an order for the sale of the property in controversy, and situate in Wyandotte County, Kansas, and not in Johnson County, Kansas, for cash (Rec. p. 9), and on March 3, 1869, he sold the property in controversy to Joel F. Kinney for $2,000, and reported said sale to the Probate Court of Johnson County, Kansas, on March 18, 1869, and said sale was examined, approved and confirmed by the Court on the same day (Rec. p. 12).

In brief the George Washington who is a plaintiff in error in this case was an entirely different person from the George Washington who was interested in land in Johnson County, Kansas, and for whom Jonathan Gore was appointed guardian. The George Washington who is plaintiff in error herein never lived in Johnson County, Kansas, and never owned any land there, and the Probate Court of Johnson County had no jurisdiction to appoint a guardian for either his person or his property. A guardian for George Washington was appointed by the Probate Court of Wyandotte County, Kansas, but no guardian was ever appointed for him by the Probate Court of Johnson County, Kansas. The pretended sale by Jonathan Gore, guardian, to Joel F. Kinney, was made, and deed executed, nearly five months before he petitioned the Probate Court of Johnson County, Kansas, for authority to sell the land, and the deed made by the guardian before he was authorized to make it, was and is absolutely void—a mere piece of waste paper.

Let us look into the facts in the order originally stated.

1. The plaintiff in error, George Washington, never owned any land in Johnson County, Kansas, but did own land in Wyandotte County, Kansas, and there is no showing that he ever lived in Johnson County, Kansas, and, consequently, the Probate Court of Johnson County had no authority to appoint a guardian for him, or to authorize the sale of his lands in another county.

2. Elizabeth Longtail was appointed the guardian of the plaintiff in error, George Washington, on July 9, 1862, by the Probate Court of Wyandotte County, Kansas, and no other Probate Court in the State of Kansas had any authority to appoint another guardian for either his person or his property.

It is elementary law that where a court of competent jurisdiction assumes control over a subject matter, it has such jurisdiction to the exclusion of all other courts.

Savings Bank vs. Simpson, 22 Ks., 414, 431.

3. The deed from Jonathan Gore, guardian, to Joel F. Kinney, of date October 14, 1868, is void (a) because Jonathan Gore was never appointed as guardian of the defendant, George Washington, who was the son of Susan Whitefeather, but was appointed as the guardian of George Washington, the minor son of George and Judy Washington, who lived and owned land in Johnson County, Kansas; (b) because the guardian's deed was executed and delivered by the guardian before he

obtained authority from the Probate Court to make it; (c) because the petition of the guardian for the sale of the lands of the minor did not describe the property in controversy and on account of fatal irregularities in the proceedings had for the sale of said land, and (d) because the guardian's deed is void on its face.

(a) We cannot see how it is possible for anyone to read the two patents, one to Susan Whitefeather, the head of a family consisting of herself and George Washington (Rec. p. 3), and the other to George Washington, the head of a family consisting of himself, Judy Washington, David Washington and Rebecca Washington (Rec. p. 5), in connection with the proceedings in the Probate Court of Wyandotte County, Kansas, in which Elizabeth Longtail was appointed as the guardian of George Washington, a minor, resident in Wyandotte County, Kansas, who was the only surviving child of his deceased mother, Susan Whitefeather, who had 400 acres of land situated in said county (Rec. p. 17), and the proceedings in the Probate Court of Johnson County, Kansas, in which Jonathan Gore was appointed as the guardian of George Washington, a minor, resident in Johnson County, Kansas, and whose parents, George and Judy Washington, were both dead (Rec. pp. 7 and 8), without being convinced that the George Washington for whose estate Jonathan Gore was appointed the guardian, was not the plaintiff in error herein, George Washington, the son of Susan Whitefeather.

(b) It would hardly be necessary to cite authorities

to show that a deed made by a guardian before he got authority from the court appointing him to make it, would be absolutely void. To contend that it would not be void would be equivalent to saying that no prior authority from the court is necessary.

(c) Even conceding that Jonathan Gore had been legally appointed as the guardian of George Washington, the son of Susan Whitefeather, and that he had made the guardian's deed after he had been authorizd to make it, still the proceedings leading up to the pretended sale were so fatally irregular, that they were absolutely void.

The statute in force at the time the proceedings were had was Ch. 75, Laws of 1859 (Comp. L. 1862, p. 576), which provided as follows:

"Sec. 10. When not in violation of the terms of a will by which a minor holds his real property, it may, under the direction of the Probate Court, be sold or mortgaged on the application of the guardian, either when such sale or mortgage is necessary for the minor's support or education, or where his interest will thereby be promoted by reason of the unproductiveness of the property, or of its being exposed to waste, or of any other peculiar circumstances.

"Sec. 11. The petition, for that purpose, must state the grounds of the application, must be verified by oath, and a copy thereof, with a notice of the time at which such application will be made to the court, must be served personally upon the minor, at least ten days prior to the term fixed for such application.

"Sec. 14. Before any such sale or mortgage can be executed, the guardian must give security, to the satisfaction of the court, the penalty of which shall be at least double the value of the property to be sold or of the money to be raised by the mortgage, conditioned that he will faithfully perform his duty in that respect and account for and apply all moneys received by him under the direction of the court.

"Sec. 16. Deeds may be made by the guardian in his own name, but they must be returned to the court, and the sale or mortgage be approved before the same are valid."

(d) The guardian's deed is void on its face. It does not recite or show any authority for the guardian to make the deed. A guardian's deed is the culmination of the efforts of the guardian to sell the lands of his ward, and it must show on its face that he was appointed guardian; that he presented a proper petition for the sale of the land of his ward and that thereon the court ordered him to sell it, and he did sell it in strict conformity to the orders of the court; that he gave bond as required by law to account for the proceeds of the sale of the land, and that the sale was reported to and confirmed by the Probate Court. This the deed fails to do, and it is therefore void on its face.

Young vs. Walker, 26 Ks., 242;
Duncan vs. Gillette, 37 Ks., 161.

This deed was made before the statute was enacted making guardian's deeds *prima facie* evidence of the regularity of the proceedings (Act of 1883, amending Sec. 18, Guardian and Ward Act), and no presumptions are to be indulged in favor of the validity of the guardian's deed, or the regularity of the probate proceedings.

Gatton vs. Tolley, 22 Ks., 678.

Only one thing more remains to be discussed and that is the effect of the approval of the guardian's deed by the Secretary of the Interior.

By the treaty between the United States and the Shawnee Tribe of Indians, as shown in and by the patents to the Indians, the lands to be allotted and conveyed to the Indians were not to be alienated or conveyed by them without the consent of the Secretary of the Interior for the time being. This proviso was a mere restriction on the right of the Indian to convey his lands, and did not give the Secretary of the Interior any interest in the lands or any right to convey the same, or lessen, in any degree, the absolute title of the Indian to his property, and this title cannot be taken away from the Indian by any action "of Congress, or of the Executive Departments."

Jones vs. Meehan, 175 U. S., 1.

The precise point was decided by Mr. Justice Brewer, when Circuit Judge, in the case of a Miami Indian, where the treaty provisions, in this regard, were the same as in the treaty with the Shawnees.

Richardville vs. Thorp, 28 Fed., 52.

In that case it was held that where a deed of lands purports to have been executed by the heirs of a deceased Indian, neither the "certificate of identity" required by the Interior Department nor the formal approval of the deed by the secretary of that department, are conclusive on the courts as to the identity of the grantors.

See also *Frederick vs. Gray*, 12 Ks., 518.

In the trial Court the defendants in error contended:

(1) That if George Washington was defrauded it

was his duty to commence an action to have the deed made by his guardian set aside, within a reasonable time after he attained his majority, and that he should not have waited 32 years, and after his property had been enhanced in value, before bringing his action, and

(2) He is estopped from denying the validity of the sale made by his guardian by taking and receiving, at various times, money derived by the guardian from the sale of the property.

The following cases were cited as being in point:

Felix vs. Patrick, 36 Fed., 457; s. c. 145 U. S., 317;
Hannon vs. Taylor, 57 Ks., 1;
Rubideaux vs. Vallie, 12 Ks., 28.

An examination of these cases will show that none of them are in point.

In *Felix vs. Patrick*, 145 U. S., 317, affirming 36 Fed., 457, the heirs of Sophia Felix filed a bill in equity against the defendant Patrick, and his grantees, for the purpose of having them declared trustees for the plaintiffs of certain lands in the city of Omaha, which in 1861 he had caused to be entered in the name of Sophia Felix by virtue of certain scrip issued to her as a member of the Dakota or Sioux Nation of Indians.

In 1854 Sophia Felix, a half-breed Sioux or Dakota Indian, residing in Minnesota, under the treaty of July 15, 1830, and the act of Congress of July 17, 1854, was entitled to have issued to her scrip for the location of 480 acres of land, and in 1857 such scrip was issued to her

for 480 acres, and before such scrip was located she intermarried with one David Garnelle.

On March 31, 1860, certain persons unknown procured said Sophia Felix and her husband to execute a power of attorney, in blank, and quit claim deed, in blank, and in November, 1861, Patrick obtained possession of said scrip to the amount of 120 acres, and on November 21, made an application to the land office in Omaha to locate such scrip, and thereupon, in the name of said Sophia Felix, located the same upon certain described real estate in the County of Douglas and Territory of Nebraska, and the lands were afterwards a part of the City of Omaha.

Patrick also secured the blank power of attorney and quit-claim deed and shortly thereafter caused the power to be filled up with a description of the scrip, and of the property located with it, and caused the name of William Ruth to be inserted as the attorney to sell and convey the property, and caused the quit-claim deed to be filled out with a description of the property, and inserted his (Patrick's) own name as grantee. The bill prayed that Patrick, and numerous innocent purchasers of the property from Patrick, be decreed to hold the property in trust for the plaintiff. Act of Congress of July 17, 1854 (10 Stat., p. 304), provided that no transfer or conveyance of the scrip should be valid.

The Court found:

(1) That a large part of the land had been sold to innocent purchasers, whose only notice of the infirmity in

the title was the fact that the power of attorney and quit-claim deed were dated nearly two years prior to the scrip location.

(2) That the device of a blank power of attorney and quit-claim deed was resorted to for the purpose of evading the provision of the act of Congress against the transfer or conveyance of the scrip, and as Patrick had no right to locate the scrip for his own benefit, he must be deemed to have located it for Sophia Felix.

(3) *That the moment the scrip was located, and the title of the land vested in Sophia Felix, it became subject to her disposition, precisely as any other land would be.*

4. That while Patrick took the lands as trustee for Sophia Felix, he did not take them under an express trust to hold them for her benefit, in which case lapse of time would be immaterial, but only under an implied or constructive trust. Under such circumstances the law raises an obligation upon the part of the *cestui que trust* to make use of reasonable diligence in discovering and unearthing the fraud, and in applying to the courts for legal redress, and if the plaintiff had been an ordinary white citizen, under no legal disabilities, 28 years lapse of time would be fatal to a recovery.

(5) That the bill in equity of the plaintiffs was defective in failing to show how the fraud of Patrick came to be discovered and why it was not discovered before, and in failing to allege positive acts of Patrick in endeavoring to conceal from Sophia Felix the alleged fraud.

(6) That conceding that the plaintiffs were incapable so long as they maintained their tribal relations, and did not become citizens of the United States, of being affected with laches, it did not necessarily follow that they were entitled to the relief demanded by their bill, because,

(a) Equity did not demand that a party who 28 years before was unlawfully deprived of scrip worth only $150.00 should be put in possession of property admitted to be worth over a million dollars. That in a court of equity the punishment should not be disproportionate to the offense.

(b) While the law pronounced the transaction a fraud upon Sophia Felix, yet it lacked the element of wickedness necessary to constitute moral turpitude. If there had been a deliberate attempt on the part of Patrick, by knavish practices, to beguile and wheedle her out of her lands the case would be different.

(c) Justice required only what the law, in the absence of statutory limitation, would demand—the repayment of the value of the scrip, $150.00, with legal interest thereon, and,

(d) It would scarcely be within the bounds of possibility to suppose that Sophia Felix, if she had located the scrip herself, would have realized a tithe of the sum her heirs now demand of the defendants.

We think it is apparent that this case of *Felix vs. Patrick*, was decided on the peculiar facts of that case,

and that it is no authority in a case on the law side of the court, where the doctrine of *laches* does not obtain (12 Am. & Eng. Enc. L. (1st Ed.), pp. 533, 570), and it is not an authority in a case where both the land and the Indian who owns it is impressed by statutory or treaty requirements and restrictions.

In *Hannon vs. Taylor*, 57 Ks., 1, the controversy was as to who were the heirs of one James Blacksnake, a Shawnee Indian, under the Shawnee law at the time Blacksnake died in 1862. The defendants claimed title to the entire tract of land under a deed from William Williams, a half-brother of James Blacksnake, to A. J. Gabbart and A. H. Baldwin, dated July 28, 1862, and approved by the secretary of the interior January 11, 1869. The plaintiff claimed title to the undivided one-half of said land under a deed from Ko-to-wah-cum-se, a daughter of Robert Williams, also called George Williams, and the heirs of Pish-e-qua-pe-a-se, his widow. Robert Williams was the brother of William Williams, and a half-brother of James Blacksnake. Robert Williams died in 1859, before the death of James Blacksnake. The deed to Gabbart and Baldwin was accompanied by a certificate, signed by Charles Bluejacket and Eli Blackhoof, the two chiefs of the Shawnee tribe of Indians, certifying that William Williams was the brother and sole surviving heir of James Blacksnake, deceased. The trial court found for the defendants.

The Supreme Court held that the question to be

decided in the case was *whether or not the grantors of the plaintiff, who were the heirs of Robert Williams, the half-brother of James Blacksnake, had, at the time they executed the conveyance to Hannon, a subsisting half-interest in the land.*

The plaintiff contended that the widow and child of Robert Williams, who died before James Blacksnake did, took the same share of his estate that Robert Williams would have taken if living, while the defendants contended that the whole estate went to the nearest of kin; that Pish-e-qua-pe-a-se, the widow of Robert Williams, could not inherit from James Blacksnake in any event, because she was not of his blood; that Ko-to-wah-cum-se, the daughter of Robert Williams, was one degree further removed from Blacksnake than the living half-brother; and, therefore, that she could not claim any part of his estate.

The court held that the question of heirship had to be determined by the laws, usages, and customs of the Shawnees. That there were no such laws, usages and customs until after the lands were allotted to the Indians in severalty. That as the patents were not executed until 1859, and were not delivered until 1860, and as Blacksnake died July 28, 1862, there was only a short time for the enactment of laws or the growth of customs governing the descent of real property.

Testimony was introduced showing that right after the allotment in 1857, Captain Parks, the principal chief, got up on a wagon right after a meeting held at Chilli-

cothe, Johnson County, Kansas, for the purpose of determining when and how their lands should go in case of the death of an Indian, and explained to the people that the council had decided that it would go to the nearest of kin, but no record was made of it, and the first record that was made was at a meeting held on the first Monday in December, 1868, when the descent was cast on the next of kin of the deceased, who were members of the Shawnee tribe of Indians. The next action was on May 8, 1889, when an act was passed by the Shawnee council declaratory of the Shawnee law governing the descent of land, which bore out the contention of the plaintiff. That under all the evidence there was doubt as to which was correct, the contention of the plaintiff or that of the defendants, and that in view of the certificate of the chiefs that William Williams was the sole heir of Blacksnake, and the fact that the deed to Gabbart and Baldwin had remained unchallenged for 25 years, and that during that time the city of Argentine had grown up and the land had become very valuable, the finding of the trial court would not be disturbed, as there was no claim of fraud, and the proof with reference to what the law was is so vague and indefinite that no precise conclusion could be made therefrom.

The court, however, expressly held:

(1) "If Robert Williams, as well as William Williams, had survived his deceased half-brother, James Blacksnake, it is clear that the two half-brothers would have inherited equally."

(2) "It must be conceded that the Secretary (of

the Interior) had no power to make any rule governing the descent of property, nor to make any person an heir who was not such under the Shawnee law."

(3) *"If these were really Indian lands, they were governed by the Shawnee law, and not by that of Kansas, and our statute of limitations cannot be invoked."*

If this case of *Hannon vs. Taylor,* is cited as an authority that a mere lapse of time, however great, would bar a recovery under an unextinguished Shawnee Indian title, counsel must have overlooked the following language of the court in the opinion delivered in that case:

"The deed to Gabbart and Baldwin remained unchallenged for 25 years, until the plaintiff sought to buy up the interest in the lands of those under whom he claimed. During that time the city of Argentine grew up. Railroads were constructed across the lands, and they became very valuable. *We are asked to hold that the statute of limitations applies, and that the plaintiff's cause of action is barred by lapse of time. If these were really Indian lands, they were governed by the Shawnee law, and not by that of Kansas, and our statute of limitations cannot be invoked."*

See also,

Sheldon vs. Donohoe, 40 Ks., 346;
McGannon vs. Straightlege, 32 Ks., 524;
Frederick vs. Gray, 12 Ks., 518.

In *Rubideaux vs. Vallie,* 12 Ks., 28, John Rubideaux, a Miami Indian chief, bought a tract of land in Miami County, Kansas, of Jack Vallie, and gave him therefor his promissory note for $1,900.00. When sued Rubideaux claimed that he was not liable to suit because he was a Miami Indian, but the court held that there was no law of the United States or of the state that authorized

an Indian to purchase land in Kansas, and then to refuse to pay for the same.

The case did not involve Rubideaux's right to be sued in respect to any lands allotted to him by a treaty between the United States and the Miami tribe of Indians, and is not in point.

In considering this case it must always be borne in mind that the land in controversy is Shawnee "Indian Country."

Bates vs. Clark, 93 U. S., 204;
Ex parte Kan-gi-shun-ca, 109 U. S., 556;
U. S. vs. Kagama, 6 Sup. Ct. Rep., 1112;
U. S. vs. Partello, 48 Fed., 672;
U. S. vs. Flournoy Co., 69 Fed., 866;
U. S. vs. Four Bottles of Whisky, 90 Fed., 720.

And being "Indian Country" the lands are not within the jurisdiction of the State of Kansas, nor subject to the laws thereof, and said lands cannot be taxed, or partitioned on proceedings therefor in the Kansas courts, *or sold by a guardian or administrator appointed by the state Probate Courts*, nor is said land, in any manner, subject to the laws of the State of Kansas, or process from its courts.

Coms. Miami County vs. Brackenridge, 12 Ks., 114;
Ex parte Forbes, 1 Dill., 363;
Laughton vs. Nadeau, 75 Fed., 789;
In re Le-lah-puc-ke-chee, 98 Fed., 432;
The Kansas Indians, 5 Wall., 737;
U. S. vs. Payne, 4 Dill., 389;
Harkness vs. Hyde, 98 U. S., 476;
Swope vs. Purdy, 1 Dill., 349;
Forty-three cases Cognac Brandy, 14 Fed., 542;

In re Race Horse, 70 Fed., 598;
In Persons, etc., vs. Territory, 26 P. R. (Ariz.), 311.

Nor can a Shawnee Indian, like the plaintiff, be guilty of *laches.*

Sheldon vs. Donohoe, 40 Ks., 346;
Felix vs. Patrick, 145 U. S., 317;
Laughton vs. Nadeau, 75 Fed., 789.

Nor be estopped by his acts or conduct.

Smythe vs. Henry, 41 Fed., 708;
Briggs vs. Sample, 43 Fed., 102;
Laughton vs. Nadeau, 75 Fed., 789.
Eels vs. Ross, 64 Fed., 417.

And no statute of limitations runs against him.

Sheldon vs. Donohoe, 40 Ks., 346;
Hannon vs. Taylor, 57 Ks., 1;
Felix vs. Patrick, 145 U. S., 317;
State vs. Kennard, 56 Neb., 254;

McGannon vs. Straightledge, 32 Ks., 524.

The guardian's deed is absolutely void—would be void if George Washington had, at all times, been a white boy, and not a Shawnee Indian, and no question of the statute of limitations can enter into this case, as under the agreed statement of facts, George Washington, the defendant, and R. R. Dunbar, his agent, has been in the possession of the property for more than five years, and there is no pretense that the plaintiffs, or their grantors, were ever in the possession of the property.

A void deed is a nullity and has no real existence, and there is no necessity for any action to set it aside or

have it cancelled, and it is impotent to start the statute of limitations in its favor.

Waterson vs. Devoe, 18 Ks., 223;
Hall vs. Dodge, 18 Ks., 277;
Higginbotham vs. Thomas, 9 Ks., 328;
McGee vs. Thomas, 9 Ks., 343;
Rogers vs. Clemmans, 26 Ks., 522.

In regard to the point that the defendant, George Washington, is estopped from denying the validity of the deed made by his pretended guardian because he received some of the money derived from the sale of the land, we would state the money was received by the defendant, if at all, while he was a minor, and aside from the fact that he could not be estopped, because he is a Shawnee Indian, he would not be estopped if he had been a white boy, by receiving the money while he was still a minor.

Under the treaties and acts of Congress governing the lands in dispute, neither the Shawnee Indian owners, nor their lands, are subject to the jurisdiction or control of the laws of the State of Kansas.

By the Shawnee treaty of August 8, 1831 (Revision of Indian Treaties, page 788), it is provided (Art 2) that the United States agree to grant by patent in fee simple to the Shawnees, and their heirs forever, as long as they shall exist as a nation and remain upon the same, a tract of 100,000 acres of land, to be located under the direction of the President *within* the tract of land equal to 50 miles square, which was granted to the Shawnees of the State of Missouri by the second article of the treaty of Novem-

ber 7, 1825. And it was further provided in said treaty (Art 10), that the lands so granted "shall never be sold nor ceded by them, except to the United States. *And the United States guarantee that said land shall never be within the bounds of any state or territory, nor subject to the laws thereof.*" These provisions were not abrogated by the treaty of May 10, 1854 (Revision of Indian Treaties, p. 792; *The Kansas Indians,* 5 Wall., 755).

By the treaty of May 10, 1854, the Shawnees ceded back to the United States all their lands in Kansas (Art. 1), and the United States ceded to the Indians 200,000 acres of land, and out of said land all Shawnees were entitled to, "if a single person two hundred acres, and if the head of a family, a quantity of land equal to two hundred acres for each member of his or her family." Provision was also made (Art. 4) for those of the Shawnees who might elect to live in common to make separate selections within the bounds of the tract which may have been assigned to them in common. It was further provided (Art. 9), that "Congress may hereafter provide for the issuing to such of the Shawnees as may make separate selections, patents for the same, *with such guards and restrictions as may seem advisable for their protection therein.*"

By Sec. 19 of the Act of Congress organizing the Territory of Kansas, approved May 30, 1854, it is provided, "That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as

such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with the Indian tribe, is not without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory, but all such territory shall be excepted out of the boundaries, and constitute no part of the Territory of Kansas, until said tribe shall signify their assent to the President of the United States to be included within said Territory of Kansas, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had not been passed." (10 Stat., 277.)

The same provisions were contained in the act of Congress approved January 29, 1861, admitting Kansas into the Union of States. (12 Stat., 127.)

There is no pretense or claim but what these Shawnee Indian lands remain unextinguished by treaty between the United States and such Indians, and the Shawnees have never signified their assent to the President of the United States to be included within the State of Kansas, and by treaty of May 10, 1854 (Art. 14), the Shawnees acknowledged their dependence on the government of the United States and invoked its protection and care.

The United States still recognizes the tribal char-

acter of the Shawnees and their lands are, therefore, withdrawn from the operation of the laws of the State of Kansas.

The Kansas Indians, 5 Wall., 737;
U. S. vs. Partello, 48 Fed., 672;
Ex parte Crow Dog, 109 U. S., 556;
Harkness vs. Hyde, 98 U. S., 476;
Langford vs. Monteith, 102 U. S., 140;
(Refers to act admitting Kansas into the Union);
U. S. vs. Berry, 4 Fed., 791;
Persons vs. Territory, 26 Pac. Rep. (Ariz.), 311;
Parker vs. Winsor, 5 Ks., 367;
Frederick vs. Gray, 12 Ks., 518;
Comrs. Miami Co. vs. Brackenridge, 12 Ks., 114;
Ex parte Forbes, 1 Dill., 363;
Mungosah vs. Steinbrook, 3 Dill., 418;
U. S. vs. Payne, 4 Dill., 389;
In re Lelah-puc-ka-chee, 98 Fed., 432;
Y-ta-tah-nah vs. Rebock, 105 Fed., 257;
14 Opinions Attys. Genl., 568;
20 Op. Attys. Genl., 247;
20 Op. Attys. Genl., 245.

It has been decided that such Indian lands are not subject to sale on execution (*Frederick vs. Gray*, 12 Ks., 18); that a mortgage upon such lands cannot be foreclosed by suit in a court of the state (*Comrs. Miami Co. vs. Brackenridge*, 12 Ks., 114); nor can such lands be partitioned by proceedings brought therefor in a court of the state (*Comrs. Miami Co. vs. Brackenridge*, 12 Ks., 114; *Ex parte Forbes*, 1 Dill., 363); nor can the Probate Courts of the State appoint a guardian (*Mungosah vs. Steinbrook*, 3 Dill., 418; *In re Lelah-puc-ke-chee*, 98 Fed., 432); or administrator (*U. S. vs. Payne*, 4 Dill., 389;

Y-ta-tah-nah vs. Rebock, 105 Fed., 257), of the property of such an Indian, and sell such property in the ordinary course of the administration of such estates.

In the matter of the claim of W. G. Langford to a tract of land within the Nez Perces Indian Reservation (14 Op. Attys. Genl., 568), Langford claimed title to the Missionary Station of the American Board of Foreign Missions derived by it under act of Congress of August 14, 1848, Ch. 177, and March 2, 1853, Ch. 90. He sued and recovered a judgment by default in an ejectment suit in the territorial court brought against an Indian agent occupying the same, and was put in possession thereof by a writ of assistance from said court. The attorney general of the United States held that the judgment determined nothing adverse to the Indian right; that the writ of assistance founded on such judgment was ineffectual to give Langford possession of the land to which the Indian right of occupancy still adhered, and that he was an intruder, and might be summarily removed therefrom in the mode provided by Sec. 2118, R. S. U. S.

In 20 Op. Attys. Genl., 247, it was held that an order of a court of the State of Washington enjoining an Indian agent from removing a person from an Indian reservation was void.

In 20 Op. Attys. Genl., 245, it was held that the Commissioner of Indian Affairs and his subordinates, the Indian agents, have full discretion to remove from the Indian reservation any person not of the tribe entitled to remain thereon, and cannot be interfered with by man-

damus or injunction from a court of the State, and any such order should be disregarded.

In 11 Op. Attys. Genl., 193, it was held that the lands of incompetent Wyandotte Indians were not subject to sale by a guardian appointed by a Probate Court of the state, as they were entirely exempt from the authority and control of the state. This opinion was given by Hon. James Speed on April 11, 1865.

The Supreme Court of Kansas, in its opinion, concedes that the deed of the pretended guardian of George Washington "was void for want of jurisdiction," but holds that "he took no step to challenge the validity of the guardian's deed until June 25, 1895. When, according to the agreed statement of facts upon which the case was submitted in the District Court, R. R. Dunbar, another plaintiff in error, took possession of the land as his agent," and as there was "an interval of more than 21 years after he attained his majority, within which he did nothing to assert his title or to challenge the sufficiency of the guardian's deed," he was estopped by his delay in bringing the suit and was guilty of such *laches* that he could not assert his title (Rec. p. 32). The court also says, in its decision, that "in the meantime we know, without evidence, that the property must have increased greatly in value and the record shows that it has been platted into city lots and sold in small parcels to different persons" (Rec. p. 32), but the great increase in the value of the property is not shown by the record, and does not exist in fact, as the property in controversy is of small

value, the lots being in a "boom" addition to Argentine, and, as shown by the record, the property was never fenced or in the possession of anyone until George Washington took possession of it.

Under the authorities, if the guardian's deed was void for want of jurisdiction in the Johnson County Probate Court, or because it was made five months before the guardian was authorized by such Probate Court to sell, the doctrine of *laches* would not apply even in equity, and as a defense to the cross-petition of the defendants, George Washington, and others, to quiet their title, for the reason that, according to the agreed statement of facts, they were in the peaceable possession of the property, and were under no necessity of bringing a bill to quiet their title until it was attacked (18 Am. & Eng. Encyc. L. (2d. Ed.), pp. 101, 104, 125; *Farmers Loan & Trust Co. vs. R. Co.,* 126 Fed., 46 (C. C. A., 8th. Cir.); *Wyman vs. Bowman,* 127 Fed., 258, 269 (C. C. A,, 8th. Cir.), and as their claim was not barred by any state statute of limitations, the burden would be on the plaintiffs in the suit to show, either from the face of the cross-petition of the defendants, or by the answer of the plaintiffs thereto, that extraordinary circumstances existed which required the application of such doctrine (*Wyman vs. Bowman,* 127 Fed., 258, 269 (C. C. A., 8th. Cir.).

But this was not an equitable action, but was, as stated by the Kansas Supreme Court, an action of ejectment (Rec. p. 32), and under the Kansas practice and decisions it was not converted into an equitable action by

the defendants filing a cross-petition to quiet their title, for, as was said by Mr. Justice Brewer, in delivering the opinion of the Court in *Cheesebrough vs. Parker*, 25 Ks., 566, 568, "if, instead of such general denial, the defendant sets out in detail an equitable defense, this does not change the character of the action." The action being a law action, the defense must be a plea and proof of the statutory bar, and the defense of *laches* cannot be interposed as such defense is one peculiar to courts of equity.

Beach Eq. Juris., Sec. 17;
Bates Eq. Juris., Sec. 375;
Bisphams Eq. (5th Ed.), Sec. 39;
1 Story's Eq. Juris. (12th Ed.), Sec. 64a.

In 1 Encyc. Laws of England, pp. 91-92, the law of "acquiescence" or *laches* is clearly stated. It is there said:

" 'If a person, having a right and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to it being committed, he cannot afterwards be heard to complain of the act.' This, as Lord Cottenham said (*Duke of Leeds vs. Amherst*, 2 Ph., 117), is the proper sense of the term 'acquiescence,' and in that sense it may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and it is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or without any assent on the part of the person whose 'right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him, which at all events, as a general rule, cannot be divested without accord and satisfaction,' or release under seal.

Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action, cannot take away such right, although under the name of *laches* it may afford a ground for refusing relief under particular circumstances; and it is clear that even an express promise by a person injured, that he would not take any legal proceedings to redress the injury done to him, could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding. (*De. Bussche vs. Alt.*, 8 Ch. D., 286.)

"The doctrine formerly covered a wider area than it now does. Before the Real Property Limitation Act of 1833, for the first time introduced a statutory rule of limitation into the court of chancery, that court, upon the principle embodied in the maxim, '*Aequitas vigilantibus non dormientibus subvenit*, was accustomed to refuse to entertain stale claims (2 Spence, 6); but it is now settled that mere delay constitutes no defence to a legal claim, unless the statutory period of limitation has expired, although it may sometimes operate to bar a right which was recognized in equity only. And, further, in cases where the plaintiff had not applied to the court with reasonable promptitude, he was sometimes required to establish his right at law before a court of equity would recognize it. Since the Judicature Acts, this practice has, of course, been abandoned (*Fullwood vs. Fullwood*, 9 Ch. D., 179).

"Acquiesence during the progress of the infringing act, or of steps necessarily leading to it, will bar a legal right only where it amounts to an encouragement to do the act or take the steps, in the belief or expectation that the right does not exist or has been abandoned ('standing by'), or is such as to raise an inference that the parties have acted upon an agreement inconsistent with the right asserted.

"The doctrine of 'standing by' rests upon the ground that it is fraudulent for any one to assert a right after having encouraged another to act upon an expectation that it does not exist, or has been abandoned (*Savage vs. Foster*, 2 White & T. L. C., 6th Ed., 678). This court will not permit a man knowingly, though passively, to encourage another to lay out money under an erroneous

opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement (Eldon, L. C., in *Dann vs. Spurrier*, 7 Ves., 231. The conditions of estoppel by standing by were carefully formulated by Fry, J., in *Willmott vs. Barber*, 15 Ch. D., 96)."

In the case at bar there is no element of "standing by," but the defendants in error, the plaintiffs in the trial court rely upon proceedings *in invitum* against a Shawnee Indian minor. The guardian's deed under which they claim being absolutely and incurably void, no affirmative action on the part of George Washington was necessary to set it aside. Being a void and not merely a voidable deed, it was in law no deed at all, and being a nullity, no rights were divested by it, and no rights could be acquired by it. It was not binding on George Washington, nor did it bar him from any interest in the property. No action on the part of the defendants in error, no inaction on the part of the plaintiff in error, George Washington, no resulting equity in third persons, and, more than all, no power residing in any legislative or other department of the government could invest it with any of the elements of juridical vitality.

The deed being absolutely void, it was impotent to start the statute of limitations in its favor, and its approval of the Secretary of the Interior did not have the effect of giving it life.

Such being the case, there was no necessity of affirmative action by George Washington to set it aside, and he could wait until his title was attacked, or some

move was made by parties claiming under such deed to establish their title under it, and that was just what he did in this case. George Washington is not the actor in this case. We did not begin the fight. He was attacked. The defendants in error, as plaintiffs in the court below, brought ejectment against him, and they prevailed in their suit, and George Washington lost. Now the defendants in error must have won in their ejectment suit on the strength of their title and not on the weakness of the title of George Washington. (*Mooney vs. Olsen,* 21 Ks., 691.) The land being vacant and unimproved before R. R. Dunbar took possession of it as the agent of George Washington, the constructive possession thereof followed the legal title of George Washington. It could not follow the title of the defendants in error, for constructive possession follows the legal title, and never follows a title based on a void deed. To hold that it could would be equivalent to saying that constructive possession follows the last deed, whether void or not, which no court has yet decided. George Washington was, therefore, the owner of the legal title to the property, and was at all times in either the actual or constructive possession of it, yet the Kansas Supreme Court has viewed George Washington as the actor, and put upon him, although in possession of the property, the burden of showing the strength of his title, or in default thereof, losing his right of possession, when the law of Kansas is that being in the possession of property, he

was entitled to hold such possesion until the defendants in error showed title to the property and consequent right to the possession thereof as the holder of such title.

We respectfully submit that there is error in the record and decision of the Supreme Court of Kansas that this Court should revise, and we respectfully ask that the judgment of the Supreme Court of Kansas be reversed, and for such other and further order and judgment herein as may be right under the law.

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